Goh Thian Guan v Sarawak Securities Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12-12 OF 1998 III(II)
MUHAMMAD KAMIL J
1 FEBRUARY 1999

Civil Procedure — *Affidavits — Amendment of — Whether an affidavit which has been filed can be altered by merely filing a corrective affidavit — Subordinate Courts Rules 1980 O 25 r 38(2)*

The plaintiff ('the respondent') claimed against the defendant ('the appellant') for a sum of RM55,189.03 together with interest and costs for contra losses suffered by the defendant. The plaintiff filed an application pursuant to O 22 r 3 of the Subordinate Courts Rules 1980 ('the SCR') based on the admission of the said sum in the defendant's affidavit affirmed on 13 August 1998 ('the affidavit'). The defendant subsequently affirmed a corrective affidavit purporting to alter the said affidavit. The corrective affidavit was disregarded by the learned sessions court judge and the plaintiff's application was allowed. The defendant appealed against the decision.

Held, dismissing the appeal:

The learned sessions court judge was correct in rejecting the corrective affidavit. Order 25 r 28(2) of the SCR made no provision for the alteration of an affidavit which has been filed. The correct approach is that the defendant may file a notice of application supported by a further affidavit to amend the original affidavit (see p 414I).

[Bahasa Malaysia summary

Plaintif ('penentang') menuntut terhadap defendan ('perayu') untuk wang berjumlah RM55,189.03 bersama-sama dengan faedah dan kos untuk kerugian kontra yang dialami oleh defendan. Plaintif memfailkan satu permohonan menurut A 22 k 3 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') berdasarkan kepada pengakuan terhadap jumlah tersebut di dalam afidavit defendan yang diikrarkan pada 13 Ogos 1998 ('afidavit tersebut'). Defendan kemudiannya mengikrarkan satu afidavit pembetulan bertujuan untuk mengubah afidavit tersebut. Afidavit pembetulan tersebut telah tidak diambil kira oleh hakim mahkamah sesyen yang arif dan permohonon oleh plaintif telah dibenarkan. Defendan merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

Hakim mahkamah sesyen yang arif adalah betul dalam menolak afidavit pembetulan tersebut. Aturan 25 k 28(2) KMR tidak mempunyai sebarang peruntukan untuk pengubahan satu afidavit

yang telah difailkan. Pendekatan yang betul adalah untuk defendan memfailkan satu notis permohonan yang disokong oleh satu afidavit lanjutan untuk meminda afidavit asal tersebut (lihat ms 414I).] A

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293. B

Legislation referred to

Subordinate Courts Rules 1980 O 22 r 3, O 25 r 28(2) C

Yong Sie Mee (*Goh & Partners*) for the appellant.
Yap Yau Sin (*Wan Junaidi & Co*) for the respondent.

Muhammad Kamil J: The plaintiff claimed against the defendant for a sum of RM55,189.03 together with interests and costs, for contra losses from selling-on shares bought on the defendant's instruction, and for his account. The losses claimed by the plaintiff were wholly or substantially caused and/or attributed by the defendant, its servants or agents. The defendant had taken out a third party notice against the remisier on 13 August 1998. D

On 21 August 1998, the plaintiff served on the defendant a notice of application under O 22 r 3 of the Subordinate Courts Rules 1980 ('the SCR'), on the admission of the sum in the statement of claim therein, by para 7 of the defendant's affidavit affirmed on 13 August 1998 as follows: E

> The third party mismanaged and misused my account entrusted in his care by constantly trading in excess of my trading limit without my knowledge and authorization causing me to suffer contra losses in the tune of RM55,189.03. F

After the notice of application was served, the defendant affirmed on 28 August 1998 a corrective affidavit purporting to alter the said affidavit. At the hearing in the court below, the corrective affidavit was disregarded and the learned sessions court judge allowed the plaintiff's application. Against this decision, the defendant appealed. G

Order 25 r 28(2) of the SCR made no provision for the alteration of an affidavit which has been filed. The correct approach is that the defendant may file a notice of application supported by a further affidavit to amend the original affidavit. The effect would be to withdraw the said admission by the defendant. In *Mallal's Supreme Court Practice* (2nd Ed) at p 345, it is stated: H

> Withdrawal of admissions: see *Hollis v Burton* [1892] 2 Ch 226. Where however, all the facts have been admitted the opposite party will be bound by the admission of the facts he has pleaded and will not be allowed to adduce evidence concerning them without the leave of the court, which will be given only on special grounds: *The Hardwick* 9 PD. I

A The learned sessions court judge was correct in rejecting the corrective affidavit affirmed on 28 August 1998 as it is in contravention of O 25 r 28(2) of the SCR. As such, I would dismiss the appeal with cost to the plaintiff.

Appeal dismissed.

B Reported by Tan Kah Bee

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